Petition

81-1647

Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXANDER L. STEVAS,
CLERK

NO.

In the Supreme Court of the United States

GEORGE CHRISTOPHER BRODERICK
JOHN ROBERT HOWARD
WARREN WALDON and
WILLIAM ROBERT RALSTON
Petitioners

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Whether there was insufficient evidence upon which to convict John Robert Howard and Warren Waldon.

Whether defendant William Ralston was improperly denied his severence based upon antagonistic defenses.

Whether George Broderick was denied a fair trial when the trial court found conflict of interest to exist as to his counsel, in the absence of a timely *Garcia* hearing.

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled cause on November 2, 1981, rehearing and rehearing en banc denied December 17, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed at ____ F.2d ____, and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 2, 1981, rehearing and rehearing en banc denied December 17, 1981. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE CASE

Appellants were convicted, along with co-defendants, of distribution and possession with intent to distribute marijuana, conspiracy to distribute and possess with intent to distribute marijuana, importation of marijuana, and conspiracy to import marijuana. Their convictions were affirmed by the United States Court of Appeals for the Fifth Judicial Circuit, Unit B, on November 2, 1981. Rehearing and Rehearing en banc were denied on December 17, 1981. This Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

Appellants were convicted along with co-defendants of distribution and possession with intent to distribute marijuana, conspiracy to distribute and possession with intent to distribute marijuana, importation of marijuana, and conspiracy to import marijuana. Their convictions were affirmed by the United States Court of Appeals for the Fifth Judicial Circuit, Unit B, on November 2, 1981. The facts as found by the panel were as follows:

In the evening of June 11, 1979, Broderick, Elder, John Robert Howard, William Robert Ralston, Thomson, Craig, and Warren Waldon, a.k.a. Warren Cook, met in front of Sandini's room and then went to dinner. Later that evening, Sandini walked to his Lincoln Continental automobile, removed a bottle of liquor, and handed it to Iouna, who had driven up in the van containing the ladders and skate conveyors. Sandini also distributed flashlights to Iouna, Ralston and Waldon. Singleton moved his tractor-trailer rig to another location and was later observed leaving Sandini's room with Ralston. The two men then opened the rear doors of the trailer and unidentified persons loaded the ladders and skate conveyors onto it. Baughman, who was standing next to the van, was joined by Thomson and both of them changed into working clothes. Shortly thereafter, Sandini, Craig, Butler, Iouna, Waldon and Broderick congregated in front of rooms 115 and 117. The watching officers noted that everyone except Sandini left the motel, but they were unable to determine which individuals departed in each of the various vehicles.

By this time, around midnight, the Customs Service had been informed of these activities and dispatched

an airplane which followed Singleton's tractor-trailer rig to a small airport near Greensboro, Alabama. At 3:30 a.m., the Customs crew and several officers on the ground saw a DC-6 aircraft land on the airstrip. The Custom's plane landed and nosed up to the DC-6, which had by that time turned around, to prevent it from taking off. The crew observed the tractor-trailer and one of the fuel trucks pulling away from the DC-6. The other fuel truck was abandoned nearby.

Police officers approaching the airport stopped the tractor-trailer as it was leaving the area, arrested Singleton, and observed ladders, skate conveyors, a flashlight and a ground-to-air radio in the trailer. Within a few minutes of this arrest, the fuel truck emerged from the airport area. An officer fired a warning shot and the truck stopped. Howard, the driver, Broderick, Miner, Ralston and Wolff were arrested. Shortly thereafter the red Caprice drove into a ditch as it was travelling away from the airport on the same road. Elder, Kostof, Thomson and the defendant, Robert Anthony DeSimone were apprehended in the vicinity of that automobile. Iouna was arrested and quantities of marijuana were discovered in the DC-6.

Later in the day of June 12, 1979, Butler and Waldon were apprehended at the Uniontown, Alabama bus station, several miles from the Greensboro airport. Baughman was found hitchhiking in the Greensboro area. Sandini and Craig were arrested as they drove away from Tuscaloosa.

A search of Sandini's Lincoln Continental revealed walkie-talkies, strobe lights, aeronautical charts and maps, aircraft gauges, a flashlight and items of

identification. Receipts from the Holiday Inn Motel on Aruba indicated that Kostof, Miner and Wolff stayed there on the night of June 10, 1979.

In searching the DC-6, officers found a suitcase belonging to Miner and numerous items bearing the fingerprints of Kostof, Wolff and Miner. Flight documents covering locations in Colombia, Aruba, Florida and Alabama were discovered. A map of South America located in the cockpit of the plane bore Butler's fingerprint. Elder's prints appeared on the van, and a fingerprint belonging to DeSimone was found on the trunk of the yellow Caprice. Finally, Waldon's prints were found on an out-dated flight plan situated in the cockpit of the DC-6 and on a piece of paper inside a suitcase located in the rear of the red Caprice.

At the time of trial, co-defendant Singleton testified that he had been hired by Ralston to haul some furniture, specifically television sets. Since there was a truckers' strike in progress at the time relevant here which was accompanied by a good deal of violence, he did not think it unusual that the furniture would be picked up at the airport warehouse in the middle of the night. Singleton insisted that he did not know illegal activity was afoot until after the arrest. His most damaging statement against Ralston was that upon the landing of the DC-6, Ralston, who was with Singleton in the cab of the truck, told him to "get out of here".

For the issues raised herein, it must also be noted that counsel for George Broderick repeatedly brought to the court's attention an actual conflict of interest which was ultimately recognized to exist by the trial court.

ARGUMENT

ISSUE I

THERE WAS INSUFFICIENT EVIDENCE UPON WHICH TO CONVICT JOHN ROBERT HOWARD AND WARREN WALDON.

On similar facts, this court held that the sufficiency of evidence against co-defendant Robert DeSimone was lacking, but was sufficient as to John Robert Howard and Warren Waldon. Defendants Howard and Waldon would respectfully submit that these two findings are inconsistent.

As recognized by this court, DeSimone was shown to be associated with several of the co-conspirators and was physically present at the scene at the time of the offense. The Fifth Circuit properly recognized that "mere association with persons involved in a criminal enterprise is insufficient to prove participation in a conspiracy", and that "mere presence at the scene of the crime is not enough to sustain a conspiracy conviction. . . ." Even DeSimone's flight was not enough to establish guilty knowledge and involvement. "Presence followed by flight is also inadequate proof."

The alleged involvement of John Robert Howard was no greater than that of DeSimone. On the evening of June 11, 1979, defendant Howard went to dinner with several of the co-defendants. In addition, he was found in the vicinity of the DC-6. Defendant Howard would respectfully submit there was insufficient evidence upon which he could be convicted.

The alleged involvement of Warren Waldon was also no greater, and far less, than that of DeSimone. The Fifth Circuit recognized that their assumption of vehicle rental was not supported by the record and could not be considered on review. "Waldon's possible involvement in the leasing of the yellow Caprice cannot enter into our analysis of the sufficiency of the evidence against him."

The total facts against Warren Waldon in evaluating sufficiency were described by the court as follows: "Association with several of his co-defendants, his receipt of a flashlight from Sandini, his driving the red Caprice at the motel, and the fingerprints found in the aircraft and the suitcase." Association with the co-defendants does not prove involvement in the conspiracy. *United States v. Horton*, 646 F.2d 181 (5th Cir. 1981); *United States v. Fitzharris*, 633 F.2d 416 (5th Cir. 1980); and *United States v. Barrera*, 547 F.2d 1250 (5th Cir. 1977). And his driving the red Caprice and his fingerprints being found therein are not conclusive since this was neither done at the time of the offense, nor in furtherance of the offense. It likewise only shows Waldon's association with some of the co-defendants at the motel.

Unlike DeSimone, Waldon was not even present at the scene of the offloading and was not found that evening anywhere in the area. He was found the next morning with a co-defendant at the Uniontown bus station. Merely being found the next day in the presence of a co-defendant does not establish guilt. *United States v. Rozen*, 600 F.2d 494 (5th Cir. 1979).

Thus, the only additional evidence which could be considered against Waldon were his fingerprints on the flight map found in the aircraft. Such fingerprints do not establish guilt since they were found on a readily movable object and the government could not establish that "such prints could have been impressed *only* during the commission of the crime." *United States v. Corso*, 439 F.2d 956 (4th Cir. 1971). In describing this map, the court found that, "This map was outdated, and according to a Customs Service pilot who testified for the government, had nothing to do with the flight route taken by the DC-6 in this case." Where a fingerprint is found upon a map, where the fingerprint could have been made at any period of time, and where the defendant is not shown to be otherwise at the scene of the crime, the government has failed to meet its burden of proof. The conviction cannot stand. *United States v. Collon*, 426 F.2d 939 (6th Cir. 1970). In addition, it must be noted that since Waldon was observed at the motel, he could not have been on the airplane. Thus, the evidence conclusively shows that the fingerprint was not made during the commission of the crime.

Thus, since the fingerprint was conclusively established not to have been made during the commission of the crime, the only evidence against Warren Waldon was his mere association with co-defendants. If such constitutes insufficient evidence to support a conviction for DeSimone, it should likewise constitute insufficient evidence to support a conviction for Waldon and Howard.

ISSUE II

DEFENDANT WILLIAM RALSTON WAS DENIED A SEVERANCE BASED UPON ANTAGONISTIC DEFENSES.

William Ralston raised the issue of severance due to antagonistic defenses which the Fifth Circuit recognized as being a "better argument". Co-defendant Singleton testified that he was involved because of Ralston and that he, Singleton, had an innocent belief as to his responsibilities. Although he never formally said that Ralston had the intent to be involved in the conspiracy, he did place Ralston at the scene and implied direct involvement. Ralston's attempt to allegedly insulate Singleton from direct contact with the plane indicates knowledge on the part of Ralston as to the purpose of the overall conspiracy and his involvement therein.

Ralston would submit that this testimony of Singleton establishes antagonistic defenses as previously decided by the Fifth Circuit. For example, in *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), antagonistic defenses were found. One defendant argued that the government failed to establish that he was present and involved; the other defendant argued that he did pass counterfeit money, but without the requisite intent. He also implicated by presence the first defendant. Since the second defendant's testimony served to place the first defendant at the scene with total knowledge, antagonistic defenses were found.

In the case at bar, Singleton's testimony served to not only place Ralston at the scene, but also to show his knowledge and involvement as an organizer. This is

not a case where "(the first defendant) introduced no testimony that implicated (the second defendant) in any way," *United States v. Mota*, 598 F.2d 995 (5th Cir. 1979), or where the defendants "did not attempt to transfer culpability to each other." *United States v. Johnston*, 547 F.2d 282 (5th Cir. 1977). Singleton testified in such a way as to attempt to exculpate himself and to inculpate Ralston. Such clearly amounts to antagonistic defenses.

ISSUE III

GEORGE BRODERICK WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT FOUND CONFLICT OF INTEREST TO EXIST AS TO HIS COUNSEL IN THE ABSENCE OF A TIMELY *GARCIA* HEARING.

As to George Broderick, the Fifth Circuit extends itself to say that there was no conflict of interest requiring a severance and withdrawal of counsel. Yet, this was not the decision of the trial court whose findings of fact and law should not be disturbed in the absence of an abuse of discretion. Prior to closing arguments, the court found conflicts to exist and allowed withdrawal of counsel. Thus, the issue on appeal was not whether a conflict existed, but whether counsel should have been permitted to withdraw upon request prior to cross-examination of Denton.

By ultimately recognizing a conflict to exist, but by having denied its existence at the time of cross-examining Denton, the trial court denied Broderick his constitutional right to confrontation and effective cross-examination. This could not be repaired by allowing substitution of counsel solely for the purpose of closing argument.

Secondarily, Broderick alleges that the court would have earlier allowed withdrawal of counsel if a *Garcia* hearing had been held when requested. The conflict was raised at numerous times during the trial *outside the presence* of the defendant. But it is only the defendant himself who can waive this conflict. Therefore, "where there is notice of an actual conflict of interest, the trial

judge is under a duty to advise *the defendant* of his right to separate, independent counsel. *United States v. Boudreaux*, 502 F.2d 557 (5th Cir. 1974)." *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978). Since the trial court ultimately recognized there to be a conflict of interest, his failure to have previously granted a *Garcia* hearing in the defendant's presence was improper.

CONCLUSION

For the above reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

Respectfully submitted,

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Appendix

Appendix

Opinion of the Fifth Circuit Court of Appeals

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert Anthony DeSIMONE, III, George Robert Thomson, George Christopher Broderick, Phillip Eugene Miner, David Hampton Butler, Warren Waldon, a/k/a Warren Cook, John Robert Howard, a/k/a John Hamilton, Roy Barron Elder and William Robert Ralston, Defendants-Appellants.

No. 79-5675.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Nov. 2, 1981.

The United States District Court for the Southern District of Alabama, William Brevard Hand, Chief Judge, convicted defendants of various offenses involving scheme to import marijuana into the United States, and defendants appealed. The Court of Appeals, Henderson, Circuit Judge, held that: (1) evidence was insufficient to sustain convictions of one defendant, in view of absence of evidence that defendant actually entered into an agreement with purpose of achieving unlawful objectives of importing, possessing and distributing marijuana; (2) evidence was sufficient to sustain conviction of other defendant; (3)

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

district court did not abuse its discretion in denying motions for severance; (4) district court did not err in refusing to suppress contents of suitcases where search warrant authorized search of automobile in which locked suitcase was found; (5) improper remarks to the effect that defense counsel would have let jury know if driver's license number on car rental agreement did not belong to defendant did not warrant reversal, and (6) special parole terms imposed in connection with convictions on two conspiracy counts could not stand.

Reversed in part, affirmed in part, and remanded.

1. Criminal Law —1144.13(3), 1159.2(5)

Task of Court of Appeals on appeal of conviction is to read record in light most favorable to the government and to determine whether jury's verdict is supported by substantial evidence.

2. Criminal Law —1159.2(7)

To uphold convictions on conspiracy counts, Court of Appeals must be satisfied that government proved beyond reasonable doubt that defendants had the deliberate, knowing, specific intent to join the conspiracy; it is not enough for it merely to establish a climate of activity that reeks of something foul.

3. Conspiracy —47(2)

Mere presence at scene of crime is not enough to sustain conspiracy conviction, and presence followed by flight is also inadequate proof.

4. Conspiracy —47(12)

Evidence was insufficient to sustain conspiracy conviction, despite defendant's association with codefendants at various times over period of several days and his attempted flight in middle of the night from automobile which was ditched near remote airport at which marijuana-filled aircraft had landed, in view of absence of evidence that defendant actually entered into agreement with purpose of achieving unlawful objectives of importing, possessing, and distributing marijuana. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U.S.C.A. §§841(a)(1), 846.

5. Drugs and Narcotics —124

Evidence was insufficient to sustain conviction of importation of marijuana. 18 U.S.C.A. §2; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 21 U.S.C.A. §§841(a)(1), 846.

6. Conspiracy —47(12)

Evidence was sufficient to sustain marijuana importation and distribution conspiracy conviction of defendant who was associated with several codefendants, who received flashlight from a codefendant in connection with landing of marijuana-filled aircraft, who drove automobile at motel at which codefendants had gathered, and whose fingerprints were found in aircraft and suitcase.

7. Criminal Law —622(1), 1148

Grant or denial of motion for severance of defendants is within discretion of trial court and is reversible only for abuse of that discretion. Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

8. Criminal Law —622(2)

Motion for severance of defendants should be granted only if defendant can demonstrate compelling prejudice which could not be alleviated by trial court and that he is unable to obtain a fair trial. Fed.Rules Cr.Proc. Rule 14, 18 U.S.C.A.

9. Criminal Law —622(3)

District court did not abuse its discretion in denying request for severance, where codefendant's affidavit contained no clear indication of specific and exonerative facts to which he would have testified if severance had been granted and affidavit amounted to little more than a bare, conclusory assertion that he did not conspire with his codefendants and where purportedly exonerating testimony proffered by codefendant was extremely self-serving and lacked credibility.

10. Criminal Law —622(2)

Severance was not required by defense counsel's representation that conflict of interest arose due to witness' identification of defendant rather than other person as lessee of trailer, where essence of concern expressed by counsel was that he could not press misidentification issue for defendant's benefit because

he feared that witness might then point finger at another of his clients but where the situation did not produce appreciable conflict among interests of defendants represented by counsel since person who admitted that he had rented trailer was not one of counsel's clients.

11. Stipulations —14(10)

Denial of severance motion was proper, in view of stipulation to the effect that government witness, during his testimony outside presence of jury, did not identify defendant as person who rented automobile.

12. Criminal Law —622(2)

Denial of defendant's motion for severance was not abuse of discretion, despite testimony of codefendant that defendant had hired codefendant to haul furniture and even though defendant did not testify, where it could be presumed that the defenses were consistent insofar as each relied on the circumstantial nature of the government's case and the jury's ability to hypothesize innocence of his involvement and where codefendant's testimony did not render defenses irreconcilable.

13. Criminal Law —622(2)

Severance was not warranted by remarks made by counsel for codefendants.

14. Drugs and Narcotics —189

Where search warrant authorized search of automobile for "marijuana, five locked suitcases and five unlocked suitcases," direction to search car for

marijuana justified opening suitcases since they could have easily and quite logically contained suspected contraband, and thus additional warrant was not required prior to the opening and search of locked suitcase.

15. Criminal Law —393(3)

Even assuming that defendant was illegally arrested by state authorities, where, subsequent to arrest by state authorities, defendant was arrested under federal complaint and additional fingerprint exemplars were procured at that time, suppression of fingerprint exemplars was not warranted.

16. Criminal Law —436

Rental agreement bearing defendant's signature was properly admitted into evidence under business record exception to hearsay rule. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.

17. Criminal Law —730(10)

Although prosecutor's remarks during closing argument, to the effect that defendant's counsel would have let jury know if driver's license number on car rental agreement did not belong to defendant, were improper and could not be condoned, remarks did not warrant reversal, where district judge gave curative instruction immediately and it could not be said that prosecutor's manifest intention was to comment on defendant's failure to testify.

18. Criminal Law —1166(1)

District court's decision to release government from pretrial agreement, thereby allowing undisclosed witness to testify, did not warrant reversal, where prosecutor informed court and defense counsel of witness as soon as he was informed of witness and where witness did not even identify defendant.

19. Criminal Law —1169.1(5)

Error, if any, in admitting in-court identifications made by motel manager did not warrant reversal, where defendants' presence at motel was firmly established by competent, untainted identification testimony of several other witnesses.

20. Conspiracy —51

Special parole terms imposed in connection with convictions on two conspiracy counts could not stand.

Appeals from the United States District Court for the Southern District of Alabama.

Before GODBOLD, Chief Judge, and MORGAN and HENDERSON, Circuit Judges.

HENDERSON, Circuit Judge:

This case originated with the indictment of sixteen defendants, all of whom were charged in four counts with distribution and possession with intent to distribute marijuana, 21 U.S.C.A. §841(a)(1) and 18 U.S.C.A. §2; conspiracy to distribute and to possess with intent to distribute marijuana, 21 U.S.C.A. §846, importation of marijuana, 21 U.S.C.A. §952(a); and conspiracy to import marijuana, 21 U.S.C.A. §963. The trial commenced on October 17, 1979 in the United States District Court for the Southern District of Alabama with all defendants present except H. B. Sandini, who failed to appear, and Frank Kostof and William Joseph Wolff, both of whom died before trial. At the conclusion of the government's case, the trial court granted judgments of acquittal in favor of William Thomas Craig and Charles Alsup Baughman and dismissed the first count of the indictment as to all defendants. At the end of the trial, the jury returned guilty verdicts against all defendants except Allen Ervin Singleton, who was acquitted of all charges, and George Robert Thomson, who was found not guilty on Count Four. Each defendant was sentenced consecutively to a five-year prison term, $15,000.00 fine, and ten-year special parole term on each count. This appeal followed. We affirm in part and reverse in part.

The evidence, taken in its light most favorable to the government, establishes that on June 7, 1979, several of the original sixteen defendants arrived at the Quality Inn Motel in Tuscaloosa, Alabama. Sandini, the apparent leader of the group, paid cash for all of the rooms rented and registered them in the name of Atlas Land Development Company. He and his driver, Craig, checked

into adjoining rooms numbers 115 and 117, while the other defendants in the entourage were located throughout the motel. Sandini placed several telephone calls from his room to the Island of Aruba and to a number in Florida. These circumstances aroused the suspicions of Mrs. Stevenson, the motel manager. She contacted the Tuscaloosa Police Department, which in turn undertook surveillance of the defendants. From the facts thereafter observed or uncovered, a sequence of events emerged.

On June 5, 1979, the defendant Roy Barron Elder rented two Hertz eighteen-foot stake bed trucks in Birmingham, Alabama. Several days later, Baughman purchased over 900 gallons of fuel and filled the tank of one of the Hertz trucks. On June 9, 1979, Singleton rented an eight-wheel trailer in Mobile, Alabama. He hauled the trailer to Tuscaloosa the following day and checked into the Holiday Inn across the street from the Quality Inn. On the same day, June 10, 1979, Elder purchased a Honda generator presumably to be used in conjunction with a barrel pump for transferring fuel into an airplane. The next day, the defendant George Christopher Broderick rented a van, six skate conveyors, three ladders and a barrel pump. The defendant James Joseph Iouna was seen driving the van later that evening. Also on that date, Elder and the defendant David Hampton Butler rented automobiles in Tuscaloosa, Butler leasing a yellow Caprice and Elder a red Caprice. During this relevant time period, the officers conducting the surveillance observed all of the defendants within the area of the Quality Inn with the exception of Wolff, Kostof and Phillip Eugene Miner.

On the evening of June 11, 1979, Broderick, Elder, John Robert Howard, William Robert Ralston, Thomson, Craig and Warren Waldon, a/k/a Warren Cook, met in front of Sandini's room and then went to dinner. Later that evening, Sandini walked to his Lincoln Continental automobile, removed a bottle of liquor, and handed it to Iouna, who had driven up in the van containing the ladders and skate conveyors. Sandini also distributed flashlights to Iouna, Ralston and Waldon. Singleton moved his tractor-trailer rig to another location and was later observed leaving Sandini's room with Ralston. The two men then opened the rear doors of the trailer and unidentified persons loaded the ladders and skate conveyors onto it. Baughman, who was standing next to the van, was joined by Thomson and both of them changed into working clothes. Shortly thereafter, Sandini, Craig, Butler, Iouna, Waldon and Broderick congregated in front of rooms 115 and 117. The watching officers noted that everyone except Sandini left the motel, but they were unable to determine which individuals departed in each of the various vehicles.

By this time, around midnight, the Customs Service had been informed of these activities and dispatched an airplane which followed Singleton's tractor-trailer rig to a small airport near Greensboro, Alabama. At 3:30 a. m., the Customs crew and several officers on the ground saw a DC-6 aircraft land on the airstrip. The Custom's plane landed and nosed up to the DC-6, which had by that time turned around, to prevent it from taking off. The crew observed the tractor-trailer and one of the fuel trucks pulling away from the DC-6. The other fuel truck was abandoned nearby.

Police officers approaching the airport stopped the tractor-trailer as it was leaving the area, arrested Singleton, and observed ladders, skate conveyors, a flashlight and a ground-to-air radio in the trailer. Within a few minutes of this arrest, the fuel truck emerged from the airport area. An officer fired a warning shot and the truck stopped. Howard, the driver, Broderick, Miner, Ralston and Wolff were arrested. Shortly thereafter, the red Caprice drove into a ditch as it was traveling away from the airport on the same road. Elder, Kostof, Thomson and the defendant Robert Anthony DeSimone were apprehended in the vicinity of that automobile. Iouna was arrested a few miles from the airport in the yellow Caprice. Large quantities of marijuana were discovered in the DC-6.

Later in the day of June 12, 1979, Butler and Waldon were apprehended at the Uniontown, Alabama bus station, several miles from the Greensboro airport. Baughman was found hitchhiking in the Greensboro area. Sandini and Craig were arrested as they drove away from Tuscaloosa.

A search of Sandini's Lincoln Continental revealed walkie-talkies, strobe lights, aeronautical charts and maps, aircraft gauges, a flashlight and items of identification. Receipts from the Holiday Inn Motel on Aruba indicated that Kostof, Miner and Wolff stayed there on the night of June 10, 1979.

In searching the DC-6, officers found a suitcase belonging to Miner and numerous items bearing the fingerprints of Kostof, Wolff, and Miner. Flight documents covering locations in Colombia, Aruba, Florida and Alabama were discovered. A map of South America

located in the cockpit of the plane bore Butler's fingerprint. Elder's prints appeared on the van, and a fingerprint belonging to DeSimone was found on the trunk of the yellow Caprice. Finally, Waldon's prints were found on an out-dated flight plan situated in the cockpit of the DC-6 and on a piece of paper inside a suitcase located in the rear of the red Caprice.

Of the original defendants, only Ralston, DeSimone, Thomson, Broderick, Howard, Miner, Butler and Waldon are appellants in this case.[1] They assign numerous purported errors on appeal, some of which are of common interest and others which have more limited application. We concentrate our attention on those issues which we believe are of major and controlling significance.

Sufficiency of the Evidence

[1, 2] Although all appellants timely moved for judgments of acquittal at the trial, only DeSimone and Waldon directly challenge the sufficiency of the evidence on appeal. Our task is to read the record in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and, from there, determine whether the jury's verdict is supported by substantial evidence, *United States v. Malatesta*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). To uphold the convictions on the conspiracy counts, we must be satisfied that the government proved beyond a reasonable doubt that these appellants had "the deliberate, knowing, specific intent to join the conspiracy."

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[1]Elder is now deceased and Iouna did not appeal his conviction.

United States v. Morado, 454 F.2d 167, 175 (5th Cir.), *cert. denied*, 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116 (1972). "It is not enough for it merely to establish a climate of activity that reeks of something foul." *United States v. Wieschenberg*, 604 F.2d 326, 331–32 (5th Cir. 1979).

The government's evidence against DeSimone no doubt places him in a suspect "climate of activity." He checked into the Quality Inn in Tuscaloosa on June 7, 1979 and, we can assume, occupied one of the rooms registered to the nonexistent Atlas Land Development Company. He was observed in the presence of several other defendants on the afternoon of June 11, 1979. Finally, he was apprehended in the early morning hours of June 12, 1979 in the vicinity of the red Caprice, presumably having fled from that vehicle along with three other defendants.[2]

DeSimone maintains that, at most, this evidence establishes that he was hired or was otherwise on hand to aid in the unloading of the aircraft. Perhaps this assertion may admit too much. The government did, of course, prove his association with certain other defendants, his presence near the landing site of a marijuana-laden airplane and his attempted flight.

[3-5] We have consistently held that mere association with persons involved in a criminal enterprise

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[2]The record is silent as to whether DeSimone was the driver or merely a passenger in the car. An additional shred of evidence against him, but one which is assigned little or no reliance by the government, is the discovery of his fingerprint on the trunk of the yellow Caprice.

is insufficient to prove participation in a conspiracy. *See, e. g., United States v. Horton*, 646 F.2d 181, 185 (5th Cir., 1981); *United States v. Fitzharris*, 633 F.2d 416, 423 (5th Cir. 1980); *United States v. Barrera*, 547 F.2d 1250, 1257 (5th Cir. 1977). We have just as strongly emphasized that mere presence at the scene of the crime is not enough to sustain a conspiracy conviction. *See, e. g., United States v. Reyes*, 595 F.2d 275, 280 (5th Cir. 1979); *Barrera, supra*, at 1256. Presence followed by flight is also inadequate proof. *United States v. Lopez-Ortiz*, 492 F.2d 109, 115 (5th Cir. 1974).[3] In this case, we are confronted with the combined circumstances of DeSimone's association with his co-defendants at various times over a period of several days and his attempted flight in the middle of the night from an automobile which was ditched near the Greensboro airport, a remote area. This evidence certainly arouses suspicion, but does it prove beyond a reasonable doubt that DeSimone conspired to import and distribute marijuana? We think not.

> Obviously, appellant's presence was highly suspicious, but this is not a substitute for evidence sufficient to prove beyond a reasonable doubt. Although it is certainly possible—maybe

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[3]Cf. *U. S. v. Edmonds*, 611 F.2d 1386, 1389 (5th Cir. 1980), where this court concluded that the four defendants were not "merely present" at a dock where bales of marijuana were being unloaded from a nearby shrimpboat. One defendant was the registered owner of the boat. He "appeared sweaty, smelled of marijuana and was covered with burlap fibers." One had been seen driving the truck into which the bales were loaded. The others, who had fled, were found hiding under a table and were also covered with fibers and residue. Their convictions of conspiracy to possess marijuana and possession with intent to distribute were affirmed.

> even probable—that [the appellant] was involved in the conspiracy, such speculation does not constitute proof beyond a reasonable doubt, and juries "must not be permitted to convict on suspicion and innuendo."

United States v. Rozen, 600 F.2d 494, 497 (5th Cir. 1979), *quoting United States v. Littrell*, 574 F.2d 828, 833 (5th Cir. 1978). Although it was unnecessary for the government to prove any overt act on the part of DeSimone in furtherance of the drug conspiracy, it did have to establish, either by direct or circumstantial evidence, that he actually entered into an agreement with the purpose of achieving the unlawful objectives of importing, possessing and distributing marijuana. *See United States v. Cardona*, 650 F.2d 54, 56 (5th Cir., 1981); *Littrell*, *supra*, at 832. We believe the government's proof is lacking in this respect.[4] And if the evidence fails to demonstrate DeSimone's participation in the conspiracy, it is patently insufficient to sustain his conviction of the substantive importation count. Hence, his conviction must be reversed.

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[4]Cf. *U. S. v. Alvarez*, 625 F.2d 1196 (5th Cir. 1980), where a majority of this court sitting en banc found that the evidence of the appellant's intention to be at the off-loading site and his nodded assurance to that effect to an undercover agent manifested a prior agreement to assist in the unloading of marijuana. "A reasonable jury could very well conclude that only one with knowledge of the marijuana, and who had agreed to participate in the scheme to accomplish its importation, would *promise* to be on hand at a remote and unlikely area for the unloading of cargo." *Id.* at 1198 (emphasis added). Although DeSimone may have come physically closer to actually being on hand than did the appellant in *Alvarez*, we have here no inkling of an agreement which ties him to the conspiracy.

[6] The case against Waldon is more convincing. The record reveals that he was among the group observed in the area of rooms 115 and 117 of the Quality Inn on June 11, 1979. On that evening, he went to dinner with several of the co-defendants. Later that night, shortly before the mass departure from the Quality Inn, he was seen receiving a flashlight from Sandini. He then drove the red Caprice to an area in front of room 117. The next day, he was apprehended along with appellant Butler at the Uniontown bus station.

Waldon's fingerprint was found on an international flight map which was located in the cockpit of the DC-6. This map was out-dated and, according to a Customs Service pilot who testified for the government, had nothing to do with the flight route taken by the DC-6 in this case.[5] A fingerprint belonging to Waldon also appeared on a pad of paper found inside a suitcase which was taken from the rear of the red Caprice.[6]

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[5]Waldon offered no evidence at the trial, but maintains on appeal that he is a licensed pilot and that the presence of his fingerprint on the flight map evidences nothing more than the possibility that on a prior occasion, in connection with a legitimate operation, he touched a document which then remained on the plane. We find no evidence in the record to support such a statement. On appeal the issues must be determined on the basis of the trial record. Fed.R.App.P. 10(a); *United States v. Willis*, 639 F.2d 1335 (5th Cir. 1981); *Garcia v. American Marine Corp.*, 432 F.2d 6 (5th Cir. 1970); *see Standard Oil Co. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). But even if these facts were in evidence, and drawing all reasonable inferences favorable to the government therefrom, the jury could have just as reasonably found that Waldon handled the map during the episode under investigation.

[6]Waldon challenges the admissibility of the fingerprint evidence for reasons which we explain later in assessing Butler's assignments of error.

In recounting its evidence against this appellant, the government adds that Waldon was with Butler when the yellow Caprice was rented. This assertion is derived from the testimony of John Freeman, the Dixie Air employee who handled the lease transaction involving this automobile, which was elicited outside the presence of the jury. Even though Butler's name appeared on the rental receipt, Freeman identified Waldon rather than Butler as the lessee of the automobile. Since Waldon and Butler vary drastically in physical appearance, Waldon being some seven inches taller and 225 pounds heavier, we may assume that this is no ordinary case of misidentification; rather, it appears likely that Waldon accompanied Butler to the rental office and that Freeman was simply mistaken as to which of the two signed the receipt.

Although we are led to this assumption from our reading of the record, the jury could not have reached a similar conclusion. Due to ensuing illness, Freeman was unavailable as a witness during the remainder of the trial. The jury never heard his testimony or learned of the circumstances surrounding his identification of Waldon. Rather, a stipulation subsequently read to the jurors merely stated that Freeman did not identify Butler. In short, Waldon's possible involvement in the leasing of the yellow Caprice cannot enter into our analysis of the sufficiency of the evidence against him.

Disregarding the events surrounding the automobile lease, there is still the evidence of Waldon's association with several of his co-defendants, his receipt of a flashlight from Sandini, his driving the red Caprice at the motel, and the fingerprints found in the aircraft and the suitcase. The culmination of all these facts clearly point to his

participation in the plan and occurrences of early June, 1979. Unlike DeSimone, he was not apprehended or seen in the vicinity of the landing site, but we believe that the totality of other circumstances provide a sufficient evidentiary basis to sustain the jury's finding of Waldon's guilt beyond a reasonable doubt.

Severance

[7, 8] Motions for severance were made continuously throughout the trial, with each appellant so moving on one or more occasions for one or more reasons. None of these motions was granted, and all appellants except Waldon raise the severance issue on appeal. In evaluating the various contentions, we are mindful that the grant or denial of a motion for severance made pursuant to Rule 14 of the Federal Rules of Criminal Procedure is within the discretion of the trial court and is reversible only for abuse of that discretion. *United States v. Martino*, 648 F.2d 367, 384 (5th Cir., 1981); *United States v. Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980). Such a motion should be granted only if the appellant can demonstrate compelling prejudice which could not be alleviated by the trial court and that he was unable to obtain a fair tr[illegible]ited States v. Horton*, 646 F.2d 181, 186 (5[illegible]981); *United States v. Crawford*, 581 F.2d 489, 4[illegible]1 (5th Cir. 1978).

Miner, Broderick, Thomson, Howard, Ralston and DeSimone sought severance on the ground that they intended to introduce the purportedly exculpatory testimony of co-defendant Butler, who would testify in their behalf only if he were tried separately. In support

of this motion, they filed an affidavit signed by Butler which states the following:

> 1. That I, DAVID BUTLER, am a Defendant in the above styled cause.
>
> 2. That I possess testimonial evidence which is exculpatory in nature to each of the other co-defendants.
>
> 3. Each of the other co-defendants possess [sic] testimonial evidence which is exculpatory in nature to myself.
>
> 4. I would testify on behalf of the co-defendants that I did not conspire with them, nor they with myself as charged in the Indictment.
>
> 5. That I would testify on behalf of the co-defendants that neither I or the co-defendants possessed marijuana in the manner described in the Indictment.
>
> 6. That the many co-defendants in the instant cause have assured myself and my counsel that they are willing to testify in my behalf that they never saw me in possession of any marijuana as described in the Indictment, and further, that they never conspired with myself as described in the Indictment.
>
> 7. That each of the co-defendants have [sic] indicated they would not be willing to testify at a joint trial.

> 8. That the testimony sought from the co-defendants in the instant cause by myself is relavant [sic], material, competent and non-cumulative in that the testimony of the co-defendants would clearly establish and corroborate my innocence.

With this affidavit, the appellants attempted to satisfy the criteria for severance set out in *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970), and its progeny, *see, e. g., Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979); *Abbott v. Wainwright*, 616 F.2d 889 (5th Cir. 1980). This case authority requires the movant to demonstrate 1) a bona fide need for the testimony, 2) the substance of the testimony, 3) its exculpatory nature and effect and 4) that the co-defendant will in fact testify if the cases are severed. *United States v. Duzac*, 622 F.2d 911, 912 (5th Cir. 1980); *United States v. Butler*, 611 F.2d 1066, 1071 (5th Cir. 1980). If such a showing is forthcoming, the district court must then 1) examine the significance of the testimony in relation to the defendant's theory of defense, 2) assess the extent of prejudice caused by the absence of the testimony, 3) pay close attention to judicial administration and economy and 4) give weight to the timeliness of the motion. *Id.*

[9] Assessing the appellants' motion in light of these standards, we conclude that the district court did not abuse its discretion in denying the request for severance. In particular, we note that Butler's affidavit contains no clear indication of specific and exonerative facts to which he would testify if severed. Rather, it amounts to little more than a bare, conclusory assertion that he did not conspire with his co-defendants, nor they with him. As a matter of fact, the only person who

would tend to be exonerated by this testimony is Butler himself, for nowhere does he indicate that his co-defendants did not conspire with each other.[7] Moreover, because the purportedly exonerating testimony proffered by Butler did not contravene his own penal interests, but instead was extremely self-serving, it lacked a certain amount of credibility. *See United States v. Metz*, 608 F.2d 147, 156 (5th Cir. 1979). Under these circumstances, we believe that any prejudice occasioned by the absence of Butler's testimony was outweighed by the judicial economy considerations inherent in this complex conspiracy case.[8]

Broderick contends that another of his motions for severance should have been granted on the authority of *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), when his trial counsel, Henry Pitts, represented to the district court that a conflict of interest had arisen due to a witness' identification of Broderick rather than Singleton as the lessee of the trailer. We first note that *Holloway* does not even deal with the subject of severance. Rather, it establishes a rule for the granting of a timely motion for appointment of

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[7]Since the possession count was dismissed as to all defendants, we disregard Butler's statement that neither he nor the others possessed marijuana.

[8]Baughman filed an affidavit very similar to that of Butler in which he represented that his testimony would exonerate Elder and Ralston. We are unable to locate in the record any severance motions specifically founded on this affidavit. In any event, such a motion would be no more successful than those based on Butler's affirmations. Indeed, since Baughman was acquitted at the conclusion of the government's case, he was presumably available to testify on behalf of the remaining defendants.

separate counsel upon a defense attorney's representation that, due to confidential communications with his co-defendant clients, he is aware of an actual or potential conflict of interest. Even assuming Broderick can avail himself of the *Holloway* rule in arguing the merit of his motion for severance, that opinion recognizes that the trial court is not precluded from exploring the adequacy of defense counsel's representations as long as it does not require the divulgence of confidential matter.

[10] In this case, the attorney's knowledge of the purported conflict of interest did not even have a confidential source. The record reflects that the district judge conscientiously inquired into the basis and validity of Pitts' belief that a possible conflict existed. The essence of the concern expressed by Pitts was that he could not press the misidentification issue for Broderick's benefit because he feared that the witness might then point a finger at another of his clients. We agree with the district court's determination that this situation did not produce an appreciable conflict among the interests of the defendants represented by Pitts. This is particularly true since Singleton, who actually rented the vehicle, was not one of Pitts' clients. Further, Broderick was in no way prejudiced by the denial of his motion for severance. Later in the trial, Singleton took the stand and stated affirmatively and unequivocally that he rented

the trailer in question and that the identification of Broderick was erroneous.[9]

[11] Butler complains that the denial of his motion for severance prevented him from arguing to the jury that Waldon, rather than he, had been identified as the person who rented the yellow Caprice. However, as previously noted, a stipulation was read to the jurors to the effect that Freeman, the Dixie Air employee, did *not* identify Butler as the person who rented the automobile during his testimony outside the presence of the jury. There was, of course, no mention of Waldon's name. The record discloses that the stipulation device was used at the suggestion and insistence of Butler's counsel, and that all parties affected by this particular identification problem were satisfied with this solution. Since Butler can demonstrate no compelling prejudice, we agree with the district court's determination that severance was not necessary.

[12] Ralston has a better argument for severance on the antagonistic defense theory. Of all the defendants,

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[9]At the risk of further confusing the notions of severance and appointment of separate counsel, we observe that Broderick's appellate counsel maintained for the first time at oral argument that the district court erred in failing to conduct a hearing pursuant to *U.S. v. Garcia*, 517 F.2d 272 (5th Cir. 1975). The district judge did, in fact, address a *Garcia*-type inquiry to all of the defendants represented by Pitts toward the end of the trial. Although at that time Broderick expressed his satisfaction with Pitts' representation, he now complains that this inquiry was "too little and too late." However, we conclude that insofar as appellant Broderick is concerned, the trial judge never received notice of an *actual* conflict of interest which even necessitated a *Garcia* hearing. *See U.S. v. Alvarez*, 580 F.2d 1251, 1260 (5th Cir. 1978).

only Singleton took the stand or even asserted any defense whatsoever. Singleton testified that he had been hired by Ralston to haul some furniture, specifically television sets. Since there was a truckers' strike in progress at the times relevant here which was accompanied by a good deal of violence, he did not think it unusual that the furniture would be picked up at the airport warehouse in the middle of the night. Singleton insisted that he did not know illegal activity was afoot until after the arrest. More important for our present purposes, Singleton very carefully avoided throughout his testimony any reference to guilty knowledge on the part of Ralston or any suggestion that Ralston was involved in the overall drug conspiracy. His most damaging statement in this regard came when he stated that upon the landing of the DC-6 (*not* the Custom's plane), Ralston, who was with Singleton in the cab of the truck, told him to "get out of here."

We have no doubt that Ralston's cause was not aided by Singleton's testimony. However, in our opinion, he did not suffer prejudice so compelling that his trial was ultimately unfair. "Severance is allowable when antagonistic defenses are present, but the conflict must reach a point where the defenses are *irreconcilable* and *mutually exclusive.*" *Horton, supra*, 646 F.2d 181 at 186 (emphasis added). *See also United States v. Mota*, 598 F.2d 995, 1001 (5th Cir. 1979). Ralston does not meet this strict standard. Although Singleton testified and Ralston did not, we may presume that their defenses were consistent insofar as each relied on the circumstantial nature of the government's case and the jury's ability to hypothesize the innocence of his involvement. Singleton's testimony did not render the defenses

irreconcilable. Consequently, the denial of Ralston's motion for severance was not an abuse of discretion.

[13] Several of the appellants claimed the right of severance for other reasons, primarily on the basis of remarks made here and there by co-defendants' counsel. We have examined these incidents and conclude that none of them warranted severance. Although we affirm the district court's rulings on these various motions, we are not totally unsympathetic to, and do not mean to oversimplify, the plight of defendants who find themselves involved in a trial of this magnitude and complexity.

> We are keenly aware that joint trials, especially those involving numerous defendants and multiple charges, carry substantial risks of manifest unfairness. We do not encourage trials en masse. We must, however, reckon with the realities of this type prosecution. The Constitution does not guarantee a trial free from the burdens that inevitably accompany such a trial; rather, it requires that the potential for transferability of guilt be minimized to the extent possible in order to "individualize each defendant in his relation to the mass."

United States v. Martino, supra, 648 F.2d 367 at 385 (citations omitted). We believe this objective was reasonably attained in the instant case.

Additional Issues Raised by Appellant Butler

[14] Butler alleges several trial errors which, for the most part, concern the validity of his conviction

alone. One of his contentions faults the district court for refusing to suppress the contents of a suitcase belonging to him which was found in the trunk of Sandini's car. The particular items which he sought to have suppressed were his driver's license, his Social Security card, and seven credit cards bearing his name.

Butler admits that a valid warrant had been issued aauthorizing the search of the automobile. He argues, though, that a separate warrant should have been obtained prior to the opening and search of his locked suitcase. We disagree. The warrant authorized a search of the automobile for "marijuana, five locked suitcases and five unlocked suitcases." Even though this language may be somewhat ambiguous as to whether the suitcases themselves were containers which were to be opened and searched or were merely among the concealed items to be seized, the direction to search the car for marijuana justified the opening of the suitcases since they could have easily and quite logically contained the suspected contraband. Under these circumstances, an additional warrant was not necessary. *Accord, United States v. Kralik*, 611 F.2d 343 (10th Cir. 1979) (officers were not required to obtain an additional warrant for the search of a suitcase found in the trunk of an automobile

where a warrant had already been obtained authorizing the search of the automobile for a sawed-off shotgun.)[10]

[15] Butler also contends that he was arrested in Uniontown without probable cause, and that the fingerprint exemplars obtained from him at that time should have been suppressed in accordance with *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). Assuming without deciding that Butler was indeed illegally arrested by state authorities, we are persuaded by the reasoning of the Seventh and Second Courts of Appeal in *United States v. Rowell*, 612 F.2d 1176, 1179-80 (7th Cir. 1980), and *United States v. Jarvis*, 560 F.2d 494, 498-99 (2d Cir. 1977), *cert. denied*, 435 U.S. 934, 98 S.Ct. 1511, 55 L.Ed.2d 532 (1978). Subsequent to the Uniontown incident, Butler was arrested under a federal complaint. Additional exemplars were procured at that time which could just have easily been used for comparison purposes. "The allegedly illegal state arrest was thus not a 'but for' cause of the introduction of the

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[10]Since in this case the automobile was searched pursuant to a valid warrant, the Supreme Court's decisions in *U.S. v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); and *Robbins v. California*, ____ U.S. ____, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981), are, we believe, inapposite. The searches challenged in those cases were all conducted without any warrant whatsoever. This line of authority merely establishes that the "automobile exception" to the warrant requirement is not to be extended to allow the warrantless search of all containers found in an automobile during the lawful, warrantless search of the vehicle itself. In other words, the Court has not extended the automobile exception beyond the reasons and justifications behind it. In this case, no exception to the warrant requirement is needed in support of the search.

fingerprint comparison, and therefore the fingerprint comparison was properly admitted." *United States v. Rowell, supra*, at 1179. *Davis v. Mississippi* involved a wholesale round-up of black youths, and Davis' fingerprints were the only evidence linking him to the crime. Despite Butler's assertions to the contrary, his case simply does not fit the *Davis* mold.[11]

[16] Butler's remaining claims are also without merit. The Dixie Air rental agreement bearing his signature was properly admitted into evidence under the business record exception to the hearsay rule. Fed.R.Evid. 803(6). The jury was made aware that Freeman, the Dixie Air employee, was unable to identify Butler. Thus, it was free to consider this information in assessing the weight properly attributable to the rental document.

[17] The prosecutor's remarks during closing argument, to the effect that Butler's counsel would have let the jury know if the driver's license number on the car rental agreement did not belong to Butler, were improper and cannot be condoned. Nevertheless, the district judge immediately gave a curative instruction. Moreover, since it cannot be said that the prosecutor's manifest intention was to comment on Butler's failure to testify, or that the remarks were of such a character that the jury would naturally and necessarily take them to be such a comment, reversal is not required. *See United States v. Rochan*, 563 F.2d 1246, 1249 (5th Cir. 1977).

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[11] As mentioned earlier, Waldon joined in this argument on appeal. Since he was apprehended and fingerprinted under the same circumstances, he fares no better than does Butler.

[18] Butler also objected to the testimony of Cooper Henry, the man who gave him a ride to the Uniontown bus station, because Henry had not been disclosed as a witness in compliance with the Omnibus Agreement entered into by the government and the defendants prior to trial. The record reflects that as soon as the prosecutor learned of this witness he so informed the court and defense counsel. Butler was not substantially prejudiced by the testimony because Henry did not even identify him. Under these circumstances, the district court's decision to release the government from the pretrial agreement is not reversible error. *See United States v. Jackson*, 621 F.2d 216, 220 (5th Cir. 1980); *United States v. James*, 495 F.2d 434, 436 (5th Cir. 1974).

Remaining Issues

[19] The remaining issues may be disposed of more readily. Ralston and Broderick challenge the admission of the incourt identifications made by Mrs. Stevenson. Even were we to agree with the appellants' contentions, the error is harmless beyond a reasonable doubt because their presence at the Quality Inn was firmly established by the competent, untainted identification testimony of several other witnesses.

We are also unmoved by Butler's and Miner's objections to the district court's instructions regarding the fingerprint evidence. We have read the charge with respect to this evidence and find it adequate and legally correct.

[20] The appellants' objections on constitutional grounds to the classification of marijuana as a Schedule I controlled substance under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. §801 et. seq., have been considered and rejected before. *See United States v. Odum*, 625 F.2d 626, 630 (5th Cir. 1980); *United States v. Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed.2d 752 (1980); *U.S. v. Gramlich*, 551 F.2d 1359, 1364 (5th Cir. 1977). However, the appellants succeed on their assertion that the special parole terms imposed in connection with the convictions on the two conspiracy counts cannot stand in light of the Supreme Court's decision in *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), *See United States v. Ayala*, 643 F.2d 244, 248 (5th Cir. 1981). On remand, the district court should vacate the special parole term.

There are several additional arguments which were advanced by DeSimone only. Since his conviction is reversed, we need not address those assignments of error here.

Accordingly, we REVERSE the convictions of DeSimone, AFFIRM the convictions of the remaining appellants, and REMAND for proceedings consistent herewith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: the Office of the United States Attorney, Room 311, United States Courthouse, P.O. Drawer "E", Mobile, Alabama, 36601, this _____ day of February, 1982.

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